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Supreme Court, U.S.
FILED

No. 081102 MAR 2 - 2009

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In The
Supreme Court of the United States

DANIEL and ANDREA McCLUNG,
Petitioners,

v.

CITY OF SUMNER, WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 2, 2009

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QUESTIONS PRESENTED

As a condition for approving their building permit, the City of Sumner required Dan and Andrea McClung to replace a much undersized City-owned storm sewer that served their property and numerous other lots within a several block area.[1] While the McClungs' project contributed little to the need for the new larger pipe, they were nevertheless required to bear 85 percent of its cost. The McClungs ask the Court to resolve whether just compensation is due when a permit applicant is required to upgrade a public facility far beyond what is necessary to mitigate the impacts of the new development. The questions presented are:

1. When government requires a land use permit applicant to upgrade publicly-owned infrastructure facilities to legislatively prescribed standards, is just compensation due where the government fails to show that the burden of the upgrade is roughly proportional to the impacts of the new development?

2. Do the nexus and proportionality standards of *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*, apply only to required dedications of real property, or do they equally

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[1] The first sentence of the Ninth Circuit opinion inaccurately implies that the storm water pipe at issue belongs to the McClungs: "the McClungs ... learned that *their* underground storm drain pipe did not meet the City's requirement...." (emphasis added). App. A at 4a. The pipe is not the McClungs' pipe; it is the City's pipe. That fact is uncontroverted. App. D at 52a, App. G at 59a–60a.

apply to a monetary exaction that requires the permit applicant to upgrade a public infrastructure facility?

3. Is a property owner barred from seeking just compensation because he yields under financial duress to a permit condition that effects a taking of property?

PARTIES

The petitioners, Daniel and Andrea McClung, are husband and wife.

The respondent, City of Sumner, is a municipal corporation organized under the laws of the State of Washington.

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The opinion of the Ninth Circuit Court of Appeals is reported at 548 F.3d 1219 (2008), and is reproduced as Appendix A to this petition. The district court's opinion is reported as *Tapps Brewing Inc., et al. v. City of Sumner*, 482 F. Supp. 2d 1218 (2007), and is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals, as modified upon consideration of petitioners' motion for rehearing *en banc*, was filed and entered on December 1, 2008. App. A. This petition for writ of certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The McClungs' Property

Between 1983 and 1993, Daniel and Andrea McClung acquired four adjoining lots on the northwestern corner of Valley and Main Streets in

Sumner, Washington. Soon after they obtained title to the last one, they asked the City of Sumner to vacate the alley at the rear of the lots. The City agreed to the vacation, but retained a utility easement beneath the vacated alley for its stormwater pipe – the pipe at the heart of this dispute. App. D at 52a. The pipe serves a drainage subbasin much larger than the McClungs' property, including several blocks to the west and roughly half of the adjoining high school complex on the north.

The City of Sumner's 1992 Stormwater Comprehensive Plan and the Stormwater Regulations in Ordinance 1603

In 1992 the City of Sumner adopted a Stormwater Comprehensive Plan to address flooding problems within the city and to plan additional drainage capacity to accommodate future development. To that end, the Plan called for upgrading the City pipe behind the McClungs' lots to a 24-inch diameter pipe.

In 1993 the City enacted Ordinance 1603, which established new stormwater regulations and adopted by reference the comprehensive drainage standards of the King County Surface Water Manual. The Ordinance and Manual set minimum pipe size standards for new construction. They did not, however, directly address the question of financing upgrades to public drainage facilities. Nonetheless, the City and the Ninth Circuit interpreted the Ordinance to require developers to upgrade any public storm sewer serving a proposed development to the 12-

inch diameter minimum pipe standard set by the King County Manual.[2]

The Stormwater Upgrade Required of the McClungs

After the alley behind their lots was vacated, the McClungs proceeded with plans to convert a house on one of their lots into a Subway Shop and to pave the vacated alley for parking. The project added only a small amount of new impervious surface area. After withdrawing its initial recommendation for stormwater control measures, the City advised the McClungs that they were required instead to replace the City's existing storm sewer in the old alleyway with a new 24-inch diameter pipe to bring it up to the standard set by the 1992 Stormwater Comprehensive Plan. The new pipe increased the drainage capacity more than sixteen times.

The McClungs' project had little to do with the need for the larger stormwater pipe. Their project generated little additional stormwater, and they had never experienced flooding on their property. They had, however, witnessed periodic flooding in the adjoining school parking lot which also drained into

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[2] This interpretation of Ordinance 1603 is dubious because Sumner Municipal Code § 13.36.050 provides that the developer is only responsible for "a fair and equitable pro rata portion of specific off-site drainage improvements which become necessary due to specific new development...." Whether the Ninth Circuit correctly interpreted Ordinance 1603, however, is irrelevant to the constitutional Takings issue. Petitioners maintain that the question of whether compensation is due does not depend on whether the upgrade was legislatively authorized.

the pipe. The new pipe would cure the pre-existing deficiency of the old one and provide additional capacity for future development throughout the subbasin. As the City Engineer told the Public Works Director and City Manager, "Replacement of this pipe is needed whether McClung develops or not. The additional contribution of storm water due to the [McClung] development is small. The development creates only an additional 3800 sq. ft. of impervious area." App. F at 7a.

The City told the McClungs that (1) replacing the City's existing pipe with a new 24-inch diameter pipe was a condition of their development; (2) the McClungs were financially obligated to pay the full cost of upgrading the City pipe from 6 inches to 12 inches; and (3) the City would waive $8,000 to $8,500 in permit fees to offset the costs of upgrading the pipe from 12 inches to 24 inches. App. E at 55a–56a. The total cost of the upgrade was approximately $50,000. The net cost to the McClungs, after offsetting the fee waiver, was approximately 85 percent of the total cost.

B. PROCEDURAL HISTORY

The McClungs initiated this lawsuit in state court and first sought summary judgment on state law theories. That motion was denied, and the denial was affirmed in *Tapps Brewing, Inc. v. City of Sumner*, 106 Wn. App. 79, 84, 22 P.3d 280 (2001). On remand, the trial court refused to consider the McClungs' claim that the upgrade obligation was illegal. On a second appeal, the Washington Court of Appeals reversed that refusal and remanded for consideration of the legality of the City's stormwater pipe upgrade obligation, including whether the upgrade obligation was an

unconstitutional taking. *Tapps Brewing Co., Inc. v. City of Sumner*, (unpublished opinion reported at 125 Wn. App. 1024, 2005 WL 151932, 8, 2005 Wash. App. LEXIS 158, 3-4).

In January 2006, the City removed the case to federal court based on federal question jurisdiction over the McClungs' federal Takings claim. After the McClungs' motion to remand was denied, the case was presented on cross motions for summary judgment. The district court dismissed the McClungs' state law claims and, after determining that the McClungs' federal Takings claim was ripe, it granted summary judgment to the City on that claim, as well. App. B.

The Ninth Circuit affirmed the district court on three grounds. First, it held that requiring the McClungs to upgrade the City's pipe from 6 inches to 12 inches was a "legislative, generally applicable development condition" (App. A at 10a), not an individual land use exaction, and therefore it was not subject to *Nollan/Dolan* scrutiny. App. A at 15a. Second, as an alternative ground for that result, it held that even if the upgrade were considered an exaction it is a monetary exaction, and monetary exactions are not subject to heightened scrutiny. App. A at 16a, 17a. Finally, as to the portion of the upgrade that increased the pipe size from 12 inches to 24 inches, it held that the McClungs' claim is barred because they "voluntarily" agreed to make that

upgrade in exchange for a waiver of permit fees.[3] App. A at 22a.

REASONS FOR ALLOWANCE OF THE WRIT

The first two questions presented for review are central to much of the conflict and controversy that continue to engulf the essential nexus and rough proportionality requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There are splits of authority and a wide ranging debate among commentators on both of these issues.[4] This case

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[3] On the ripeness issue the Ninth Circuit concluded that only prudential ripeness concerns are presented, and it assumed without deciding that the McClungs' federal takings claim is ripe. App. A at 10a.

[4] The immense body of commentary addressing *Nollan* and *Dolan* continues to grow apace and to reflect widely divergent viewpoints regarding what the law is and what it should be. Some of the more recent commentary includes: Alan Romero, ENDS AND MEANS IN TAKINGS LAW AFTER *LINGLE V. CHEVRON*, 23 J. Land Use & Envtl. L. 333 (2008); Michael B. Kent, Jr.; CONSTRUING THE CANON: AN EXEGESIS OF REGULATORY TAKINGS JURISPRUDENCE AFTER *LINGLE V. CHEVRON*, 16 N.Y.U. Envtl. L.J. 63 (2008); Lauren Reznick, NOTE, THE DEATH OF *NOLLAN* AND *DOLAN*?, 87 B.U. L. Rev. 725 (2007); James E. Holloway & Donald C. Guy, THE CLIMAX OF TAKINGS JURISPRUDENCE IN THE REHNQUIST COURT ERA, 16 Penn St. Envtl. L. Rev. 115 (2007); D.S. Pensley, NOTE, REAL CITIES, IDEAL CITIES, 91 Cornell L. Rev. 699 (2006); Steven A. Haskins, CLOSING THE *DOLAN* DEAL—BRIDGING THE LEGISLATIVE - ADJUDICATIVE DIVIDE, 38 Urb. Law. 487 (2006); Carlos A. Ball & Laurie Reynolds, EXACTIONS AND BURDEN DISTRIBUTION IN TAKINGS LAW, 47 Wm. & Mary L. Rev. 1513 (2006); Jane C. Needleman, NOTE, EXACTIONS: EXPLORING EXACTLY WHEN *NOLLAN* AND *DOLAN* SHOULD BE TRIGGERED, 28

offers a clear opportunity for the Court to resolve some of that conflict and to provide needed guidance for the uniform application of *Nollan / Dolan* principles.

The third ground upon which the Ninth Circuit based its decision presents a more novel question, but one that calls for the Court's consideration as a necessary corollary to resolving the first two questions. The substance of the Ninth Circuit's ruling is that a permit applicant waives his right to seek relief from an unconstitutional condition if he accedes to permit terms that grant an ancillary discretionary benefit (here, the waiver of permit fees) along with permit approval. This theory, however, is no more than a subterfuge to circumvent the doctrine of unconstitutional conditions. If not reversed, it can readily be exploited to all but nullify the doctrine of unconstitutional conditions.

Cardozo L. Rev. 1563 (2006); John C. Keene, WHEN DOES A REGULATION "GO TOO FAR?", 14 Penn St. Envtl. L. Rev. 397 (2006); Sarah B. Nelson, COMMENT, *LINGLE V. CHEVRON USA, INC.*, 30 Harv. Envtl. L. Rev. 281 (2006); W. Barr, H. Weissmann, J. Frantz, THE GILD THAT IS KILLING THE LILY, 73 Geo. Wash. L. Rev. 429 (2005); Mark Fenster, TAKINGS FORMALISM AND REGULATORY FORMULAS: EXACTIONS AND THE CONSEQUENCES OF CLARITY, 92 Cal. L. Rev. 609 (2004); J. David Breemer, THE EVOLUTION OF THE "ESSENTIAL NEXUS," 59 Wash. & Lee L. Rev. 373, 395-96 (2002).

A. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *DOLAN V. CITY OF TIGARD* AND WITH DECISIONS OF OTHER COURTS HOLDING THAT PERMIT CONDITIONS REQUIRING PUBLIC INFRASTRUCTURE UPGRADES ARE SUBJECT TO *DOLAN'S* HEIGHTENED SCRUTINY.

The Ninth Circuit held that government may require an individual permit applicant to upgrade public infrastructure to a legislatively established standard without regard to *Dolan's* rough proportionality requirement. They reasoned that such a requirement is not a land use exaction at all but, instead, "a general requirement imposed through legislation."[5] App. A at 15a. This holding conflicts with *Dolan* and with decisions of other courts which have addressed *Dolan's* applicability to permit conditions requiring public infrastructure upgrades.

Contrary to the Ninth Circuit's holding, *Dolan* indicates that a permit condition that calls for new public infrastructure is not exempt from heightened scrutiny simply because it requires upgrading to a legislatively prescribed standard. In *Dolan,* the City of Tigard required Mrs. Dolan to dedicate real estate for new public infrastructure: a public greenway and a pedestrian/bicycle pathway. These dedications were required to satisfy the legislatively established site

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[5] The Ninth Circuit held that such legislation is subject to judicial review only under the deferential *ad hoc* standards of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978). App. A at 10a.

development standards set by the City's Community Development Code ("CDC").[6] *See Dolan,* 512 U.S. at 379-380. The fact that the dedications were mandated by legislation and imposed to satisfy legislative standards, however, did not exempt them from heightened scrutiny. Legislative standards and policy must be implemented in a constitutional manner and here, as in *Dolan,* "the Takings Clause requires the city to implement its policy by condemnation" unless the City makes the required showing of nexus and rough proportionality between the impacts of the new development and the burden of the exaction. *Dolan,* 512 U.S. at 395 n.10. The Ninth Circuit's contrary holding is a direct repudiation of *Dolan*.

The Ninth Circuit's decision also is directly at odds with the decision of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620 (2004). There, the court ruled that heightened scrutiny does apply to a permit condition requiring the developer to upgrade a public street adjoining the development. The applicable legislative authority in *Town of Flower Mound* was equivalent to that in *Dolan* and in this case: a local ordinance that assigned the permit applicant responsibility to bring adjoining public infrastructure up to legislatively prescribed standards. After carefully analyzing *Dolan,* the Texas Supreme Court concluded that there was no meaningful

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[6] The CDC provided, in pertinent part, "the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway." CDC § 18.120.180.A.8 (emphasis added).

distinction between a permit condition which requires the applicant to use its money to upgrade public infrastructure to legislative standards and the permit condition in *Dolan* which required a dedication of land to meet legislative standards. Other courts have reached the same result.[7]

The Ninth Circuit took a different tack to reach the opposite conclusion. Rather than adhering to *Dolan*, it based its rule on state court decisions which have held that generally applicable development impact fees

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[7] *See, e.g., Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 14 P.3d 172 (2000) (*aff'm on other grounds, Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002) (half-street improvements to fronting streets mandated by ordinance held subject to heightened scrutiny); *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill.App.3d 926, 940, 661 N.E.2d 380, 389 (1995) (legislative dedication requirement subject to *Nollan/Dolan* scrutiny) (*cert denied* 519 U.S. 976); *Schultz v. City of Grants Pass*, 131 Or.App. 220, 884 P.2d 569 (1994) (dedication of land for street improvements as required by ordinance subject to heightened scrutiny); *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) (street dedication required by ordinance invalid where dedication did not relate to impact of new development); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill.2d 25, 649 N.E.2d 384 (1995) (interpreting state constitution, court held traffic impact fee subject to heightened scrutiny); *United Dev. Corp. v. City of Mill Creek*, 106 Wn.App. 681, 26 P.3d 943 (2001), *rev. den.*, 35 P.3d 380 (2001) (drainage upgrade requirement invalid under statute and ordinance unless it directly mitigates impact of new development). *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (transfer of interest on funds held in court registry to court clerk pursuant to statutory mandate constitutes taking of property without just compensation); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003) (transfer of private funds to government as mandated by court rule is "more akin" to physical taking than to regulation of property).

are exempt from heightened *Nollan / Dolan* scrutiny.[8] App. A at 11a. The Ninth Circuit reasoned that if legislatively prescribed impact fees are exempt from heightened scrutiny, then a legislatively prescribed public infrastructure upgrade must also be exempt from heightened scrutiny.

The rationale of the impact fee decisions, however, does not extend to permit conditions which impose individual public infrastructure upgrade requirements.[9] Those cases involved broad based fees calculated in accordance with legislatively prescribed formulae and uniformly applied to legislatively determined classes. Such uniform fee structures do not pose the same risk of unfair, disproportionate leveraging as permit conditions requiring individuals to make unique upgrades to public infrastructure. Individualized upgrade exactions are not formulaic fees which rationally and uniformly apportion public infrastructure costs to classes of properties which create the infrastructure needs. Instead, Mrs. Dolan and the McClungs were arbitrarily selected to bear unique and disproportionate upgrade burdens simply

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[8] *City of Olympia v. Drebick*, 156 Wn.2d 289, 126 P.3d 802 (2006); *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 117 Cal. Rptr.2d 269, 41 P.3d 87 (Cal. 2002); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (1997); *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836 (1995). *See also, Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. den.* 515 U.S. 1116 (1995) (*Dolan* does not apply to a development condition imposed through a legislative process rather than through individualized determinations).

[9] The validity of these impact fee decisions has not been addressed by the Court and is not placed at issue by the facts of this case.

because they happened to apply for building permits to improve their property.

The Ninth Circuit's analysis went astray, in part, because it failed to follow the path laid out by this Court for analyzing land use exactions. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005). That analysis starts by asking whether, absent a permit application, the City would have been required to pay compensation if it had forced the McClungs to upgrade the City's stormwater pipe. If the answer is *yes* (and *Dolan* makes clear that the answer is *yes*), then compensation is required unless the government establishes nexus and rough proportionality. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987) (government action that works a taking necessarily implicates the obligation to pay just compensation).

The Ninth Circuit's decision, if not reversed, will seriously undermine *Dolan* and the protections of the Takings Clause. It allows municipalities to allocate public infrastructure costs arbitrarily, rather than according to the specific impacts of a proposed development or according to a rational and uniform scheme of generally applicable impact fees. It permits gross inequity in the allocation of infrastructure costs and allows municipalities to do exactly what the Takings Clause forbids: select some to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court should, therefore, grant the writ to resolve the conflicts and confusion over the application of *Nollan / Dolan* scrutiny to permit conditions that require public infrastructure upgrades.

B. THE COURT SHOULD CLARIFY THE APPLICATION OF HEIGHTENED SCRUTINY TO MONETARY LAND USE EXACTIONS.

As an alternative ground for its holding, the Ninth Circuit ruled that heightened scrutiny does not apply to monetary exactions because monetary exactions do not require the applicant to "relinquish rights in the real property" and because "money is fungible." App. A at 16a, 17a. This, too, is a question hotly debated by courts and commentators. Some courts and commentators suggest that *Nollan / Dolan* scrutiny does not apply to monetary exactions.[10] Most courts, however, disagree.[11] The Court should accept review

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[10] *San Remo Hotel, L.P. v. S.F. City & County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd on other grounds*, 545 U.S. 323 (2005); *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998); *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. den.*, 504 U.S. 931 (1992). *See also*, *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 486, 930 P.2d 993, 1000 (1997) (fee is a "considerably more benign form of regulation" and therefore not subject to heightened scrutiny) *cert. denied* 521 U.S. 1120 (1997)); *Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327, 1340 (Fed.Cir. 2001), *cert. den.*, 535 U.S. 1096 (2002); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (percentage fee exacted from Iran-United States Claims Tribunal award as service fee is not a *per se* taking); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539-550 (1998) (J. Kennedy *concurring and dissenting*; excessive payment required by Coal Act not considered taking of property); Daniel Pollak, REGULATORY TAKINGS: THE SUPREME COURT TRIES TO PRUNE AGINS WITHOUT STEPPING ON *NOLLAN* AND *DOLAN*, 33 Ecology L.Q. 925, 931 (2006).

[11] *Rose Acre Farms, Inc. v. U.S.*, 373 F.3d 1177, 1197 (Fed Cir. 2004), *cert. den.*, 545 U.S. 1104 (2005); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. den.*, 543 U.S. 956 (2004), *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620

to resolve whether monetary exactions are *per se* exempt from *Noilan / Dolan* scrutiny and whether government can require a permit applicant to pay for upgrading public infrastructure without regard to the limitations of *Nollan / Dolan.*

There are three compelling reasons why there should be no distinction between a land use permit condition that requires an applicant to dedicate an interest in real property and a condition that requires the applicant to pay to build new public infrastructure. First, the Takings Clause extends to all property:

(2004); *Ehrlich v. City of Culver City*, 50 Cal.Rptr.2d 242, 246, 11 P.2d 429, 433 (1996), *cert. den.*, 519 U.S. 929 (1996) ("We thus reject the city's contention that the heightened takings clause standard formulated by the Court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval."); *Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 14 P.3d 172 (2000); *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn.App. 522, 979 P.2d 864 (1999); *Clark v. City of Albany*, 137 Or.App. 293, 904 P.2d 185 (1995); *St. Johns River Water Mgmt. Dist. v. Koontz*, --- So.2d ----, 2009 WL 47009, 3 (Fla.App. 2009). *Cf. Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (required transfer of private funds to government is "more akin" to physical taking than to regulation of property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155,162 (1980) (exaction of interest on funds held in court as taking); *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097, 1110 (9th Cir. 2001) ("[t]he Fifth Amendment protection of property would be eviscerated were we to construe confiscation of fungible intangibles [money] as not amounting to a taking, as defendants urge.") *modified on rehearing en banc*, 271 F.3d 835, *aff'd on other grounds*, *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Garneau v. City of Seattle*, 147 F.3d 802, 815 (9th Cir. 1998) (J. O'Scannlain *concurring and dissenting*).

money is no exception. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (monetary exaction that is not reasonably related to services provided to or burdens created by the payor is a taking of property, not merely an exercise of police power). When property (including money) is taken for public use, compensation is required. The obligation to pay compensation depends on the nature of the taking, not the type of property taken.[12] It does not matter that money is fungible: fungibility does not determine whether compensation is due when property is taken for public use.

Second, exempting monetary exactions from *Nollan / Dolan* scrutiny is fundamentally inconsistent with the very purpose of development mitigation exactions and fees. "Impact fees are payments required by local governments of new development for the purpose of providing new or expanded public capital facilities required to serve that development." American Planning Association, Policy Guide on Impact Fees, (ratified 1997). "The main goal of the imposition of exactions is 'to shift to the developer the costs of the public infrastructure that the development requires.' Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community." *Rogers Mach., Inc. v. Washington County*, 181 Or.App. 369, 382, 45 P.3d 966, 973 (2002), *cert. den.*, 538 U.S. 906 (2003) (*quoting* Abraham Bell and Gideon Parchomovsky, GIVINGS,

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[12] Obviously, there are circumstances in which government may legitimately require the payment of money or other property without compensation, *e.g.*, taxation, legitimate fees and penalties. But absent such circumstances, heightened scrutiny should apply to exactions of money, just as any other property.

111 Yale L.J. 547, 609 (2001)).[13] By requiring a somewhat tight fit between the exaction and the external costs produced by the new development, *Dolan* helps assure that the exaction serves this cost internalization function. If the fit is loosened, the exaction no longer corresponds to the external costs of the development and becomes just another method of raising revenue. And, because land use exactions are so highly susceptible to leveraging and other abuses, they will inevitably be used for improper, cost shifting purposes.

This case vividly illustrates the concern. The obligation imposed on the McClungs did not mitigate the external costs produced by their new development. Their development had almost nothing to do with the need for the new stormwater pipe. Rather, the McClungs were arbitrarily selected to pay for the new pipe simply because they happened to apply for a building permit. *Cf. Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1274 (8th Cir. 1994) (arbitrary imposition of disproportionate share of cost for public drainage system is unconstitutional). Without the rough proportionality standard to police such abuse, monetary land use exactions can be transformed from a legitimate regulatory tool that

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[13] *See also, Upton v. Town of Hopkinton*, 157 N.H. 115, 119, 945 A.2d 670, 674 (2008); *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 685 (Minn.,1997) ("[K]ey to the concept of a true impact fee is that the amount assessed a developer must reflect the cost of infrastructure improvements necessitated by the development itself."); Jonathan H. Adler, MONEY OR NOTHING: THE ADVERSE ENVIRONMENTAL CONSEQUENCES OF UNCOMPENSATED LAND USE CONTROLS, 49 B.C. L. Rev. 301, 303-304 (2008).

compels developers to internalize externality costs into an abusive fund raising device the exploits the government's permit power monopoly.

Finally, if monetary exactions generally were exempt from *Nollan / Dolan* scrutiny, the exemption would swallow the rule. Government could effectively evade *Nollan / Dolan* scrutiny even for exactions of real property by first exacting money in any disproportionate amount (free from the shackles of *Nollan / Dolan*), then use the money to buy the land in a condemnation proceeding or otherwise. *Garneau v. City of Seattle*, 147 F.3d 802, 815 (9th Cir. 1998)(J. O'Scannlain *concurring and dissenting). See also, Benchmark Land Co. v. City of Battle Ground*, 103 Wn.App. 721, 727, 14 P.3d 172, 175 (2000). In this way, the constraints of *Nollan / Dolan* could be avoided for any type of property – including real property. The ultimate result would be that heightened scrutiny would no longer be a requirement for any land use exactions at all.

The Court should grant certiorari to reverse the Ninth Circuit's alternative holding, make clear that monetary exactions are not *per se* exempt from *Nollan / Dolan* scrutiny, and rule that compensation is required where government requires the permit applicant to pay for new public facilities beyond what is necessary to mitigate the impacts of the applicant's new development.

C. THE NINTH CIRCUIT'S IMPLIED CONTRACT THEORY IS A SUBTERFUGE TO EVADE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND SHOULD BE REVERSED.

The Ninth Circuit ruled that the McClungs relinquished their right to seek just compensation for upgrading the City's pipe from 12 inches to 24 inches because they voluntarily agreed to make that portion of the upgrade in exchange for a waiver of permit fees. App. A at 22a. This interpretation of the McClungs' permit conditions reflects a disturbing disregard of the facts, and appears to be simply a subterfuge to avoid the doctrine of unconstitutional conditions. That interpretation should be reviewed and reversed.

The doctrine of unconstitutional conditions "limits the government's ability to exact waivers of rights as a condition of benefits" because "[g]iving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections." *U.S. v. Scott*, 450 F.3d 863, 866-867 (9th Cir. 2006). Unless the nexus and proportionality requirements of *Nollan/Dolan* are satisfied, the doctrine prohibits government from conditioning a land use permit on a property transfer that would otherwise require just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (J. Scalia, *dissenting from denial of certiorari*).

To avoid the doctrine of unconstitutional conditions, the Ninth Circuit construed the terms of

the McClungs' building permit as consisting of two independent components: (1) a building permit that required the McClungs to install a 12-inch pipe, and (2) a separate, voluntary side-agreement in which the McClungs agreed to install an even larger 24-inch pipe in return for a waiver of permit fees. App. A at 10a. This voluntary side agreement, in the court's view, did not implicate the doctrine of unconstitutional conditions because it did not involve the coercive exercise of the City's permit power to gain the McClungs' assent to the bargain.

This "voluntary agreement" theory, however, is a complete fabrication which is directly at odds with the uncontroverted facts. The City's December 27, 1995 letter setting the terms of the McClungs' permit states unequivocally: "*a 24-inch diameter storm drain is to be installed as a condition of development.*" App. E at 55a.[14] The Ninth Circuit's claim that "the McClungs were given the choice of either installing a 12-inch pipe and paying the usual fees, or installing a 24-inch pipe and receiving the fee waiver" (App. A at 21a) is not true and not supported by any facts in the record. There was no option for the McClungs to install a 12-inch pipe. The upgrade to 24 inches was mandatory. The McClungs' only choice was between installing a 24-inch pipe with a fee waiver or foregoing their permit. Because the 24-inch upgrade obligation, even with the fee waiver, was wholly disproportional to the impact of their new development, it was an

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[14] Especially in the context of summary judgment – where the facts are to be construed most favorably to the McClungs – the Ninth Circuit's disregard of the evidence is extraordinary. The December 27, 1995 letter means what it says: "a 24-inch diameter storm drain is to be installed as a condition of development."

unconstitutional condition for which the McClungs are entitled to compensation.

Rightful concerns have been expressed that lower courts may be seeking to evade the mandate of *Nollan / Dolan*. *See Lambert v. City and County of San Francisco, supra*. It is difficult to conceive of another explanation for the Ninth Circuit's clear disregard of the facts. Its voluntary agreement theory seems merely a subterfuge to evade the reach of the doctrine of unconstitutional conditions. If that subterfuge is permitted to stand, it will further undermine the uniform application of *Nollan / Dolan* principles and potentially undermine the doctrine of unconstitutional conditions in other contexts as well. If ancillary terms to a permit, license, or contract can be construed as creating separate, voluntary side-agreements whenever the underlying permit or contract implicates the doctrine of unconstitutional conditions, it is apparent that the scope and effectiveness of that doctrine in controlling government abuses will be greatly reduced.

CONCLUSION

The nexus and rough proportionality standards of *Nollan / Dolan* serve two complementary functions. First, they promote effective land use regulation by requiring that permit conditions actually address the externality impacts of proposed development. Without a tight linkage between the public burden created by a development and the mitigation burden placed on the developer, this regulatory purpose is lost. Second, *Nollan / Dolan* standards protect property owners from arbitrarily being selected to "bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Armstrong v. United States*, *supra*. To clarify and promote the uniform application of *Nollan / Dolan* principles, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35231
D.C. No. CV-06-05006-RBL

[Filed September 25, 2008]
[Amended December 1, 2008]

DANIEL MCCLUNG; ANDREA MCCLUNG, individually and as a marital community, *Plaintiffs-Appellants*,	)
and	)
TAPPS BREWING, INC., a Washington corporation, *Plaintiff*,	)
v.	)
CITY OF SUMNER, *Defendant-Appellee*.	)

ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted
July 11, 2008—Seattle, Washington

Filed September 25, 2008
Amended December 1, 2008

Before: Richard R. Clifton and N. Randy Smith, Circuit Judges, and J. Michael Seabright,* District Judge.

Opinion by Judge Seabright

COUNSEL

William C. Severson, William C. Severson PLLC, Seattle, Washington, for the plaintiffs-appellants.

Michael C. Walter, Keating, Bucklin & McCormack, Inc., Seattle, Washington, for the defendant-appellee.

ORDER

The opinion filed on September 25, 2008, is amended as follows:

On slip Opinion page 13750, insert a new footnote 3 at the bottom of the page after the sentence that

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* The Honorable J. Michael Seabright, United States District Judge for the District of Hawaii, sitting by designation.

ends ". . . applies to Ordinance 1603." (and renumber the subsequent footnotes):

> We observe that the ordinance before us concerns a permit condition designed to mitigate the adverse effects of the new development. New construction increases the burden on the City's sewer system and increases the loss that might result from flooding. After experiencing considerable flooding, the City enacted Ordinance 1603 to require most new developments to include specified storm pipes. We are not confronted, therefore, with a legislative development condition designed to advance a wholly unrelated interest. We do not address whether *Penn Central* or *Nollan/Dolan* would apply to such legislation.

With the opinion as amended, Judge Clifton and Judge N.R. Smith voted to deny the petition for rehearing en banc and Judge Seabright so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed October 9, 2008, is DENIED.

No further petitions for rehearing or rehearing en banc may be filed by the parties.

OPINION

SEABRIGHT, District Judge:

In 1995, Daniel and Andrea McClung (the "McClungs") sought to develop property they owned in the City of Sumner (the "City"), and learned that their underground storm drain pipe did not meet the City's requirement for new developments to include pipes at least 12 inches in diameter. The McClungs assert that the City's subsequent request that they install a 24-inch pipe in exchange for the City approving their permit application and waiving certain permit and facilities fees effected an illegal taking of their property. This case presents an issue of first impression in this Circuit — whether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), or the nexus and proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). We affirm, holding that the *Penn Central* analysis applies to the 12-inch pipe requirement. As for the installation of the 24-inch pipe, we conclude that the McClungs voluntarily contracted with the City to install the 24-inch pipe and thus the installation of that pipe was not a "taking" by the City.

I.

Between 1990 and 1992, the City experienced considerable flooding. To address this problem, the

City took several steps, including adopting Ordinance 1603 which requires most new developments to include storm pipes with a minimum 12-inch diameter, outlining plans for the City to replace certain storm pipes with 18-, 21-, and 24-inch pipe, and constructing a storm drainage trunk line paid for in part through raising the stormwater general facility charge ("GFC") imposed on property owners.

Between 1983 and 1993, the McClungs purchased four adjoining residential properties in the City, and in May 1994, approached the City about converting one property into a Subway sandwich shop and paving an alley for use as a parking lot. The City had previously vacated this alley in exchange for certain conditions, including receiving an easement for public utilities and services that ran under the alley. During the course of discussions regarding the steps the McClungs would need to take to comply with the City's flood requirements, the parties learned that the storm pipe under the property was 12-inch pipe for four feet, then changed to 6-inch pipe for the remaining 350 feet. Because this pipe did not comply with Ordinance 1603 and did not meet the City plans for replacing certain pipes with 24-inch pipe, the City Engineer, via letter, offered to waive certain fees in exchange for the McClungs installing a 24-inch instead of 12-inch pipe:

> To correct existing deficiencies, meet the needs of your development and satisfy the future requirements as outlined in the Storm Water Comprehensive Plan, a 24-inch diameter storm drain is to be installed as a condition of development.
>
> . . .

> As a developer, you are required to install a 12-inch storm drain as a minimum. My estimate shows the cost difference between a 12-inch and a 24-inch diameter pipe ranges from $7,200 to $7,500. To offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm drainage systems for both the development and the Subway Shop. . . . If you find this acceptable, please proceed with the revisions to the Plans.

The McClungs revised their development plan to include a 24-inch pipe, which was approved on April 25, 1996. A 24inch pipe was subsequently installed on the property.

Despite voicing no objection to the 24-inch pipe installation requirement and receiving the benefit of certain fees being waived, on April 27, 1998, the McClungs filed a complaint in Washington state court asserting violations of Washington state law. After several years of protracted state court litigation (including a summary judgment motion, an appeal, a trial, and further appeals), the Washington appeals court found that the McClungs should be permitted to amend their complaint to allege explicitly a violation of their Fifth Amendment rights and remanded the action to the trial court. *Tapps Brewing, Inc. v. McClung*, 2005 WL 151932, at *8 (Wash. App. Jan. 25, 2005).

The McClungs subsequently amended their complaint to allege that the City's requirement that

they upgrade the storm drain was a taking in violation of the Fifth Amendment. In response, the City removed the action to the United States District Court for the Western District of Washington.

On cross-motions, the McClungs sought summary judgment on their federal takings claim, and the City sought summary judgment on all remaining claims.[1] *See Tapps Brewing, Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1224-25 (W.D. Wash. 2007). For the McClungs' takings claim, the court separately analyzed Ordinance 1603's requirement that all new developments include 12-inch storm pipe and the City's request that the McClungs install a 24-inch storm pipe. Applying the ad hoc analysis of *Penn Central*, the court determined that the 12-inch storm pipe requirement was not an unconstitutional taking. *Id.* at 1228-31. Regarding the 12-inch to 24-inch request, the court found that the McClungs had contracted to install the 24-inch pipe in exchange for a waiver of the GFC and various fees. *Id.* at 1231. The McClungs' appeal followed.

II.

The district court's grant of summary judgment in favor of the City is reviewed de novo, under the same standards applied by the district court. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 538 F.3d 1090, 1094 (9th Cir. 2008). "We must determine

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[1] The district court granted the City's motion on the McClungs' state law claims. *See Tapps Brewing, Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1231-33 (W.D. Wash. 2007). The McClungs do not appeal this determination.

whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issues of material fact exist, and whether the district court correctly applied the relevant substantive law." *Fazio v. City & County of S.F.*, 125 F.3d 1328, 1331 (9th Cir. 1997).

III.

A.

Before turning to the merits of this appeal, we address briefly the issue of ripeness, "lest we overstep our jurisdiction."[2] *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 871 (9th Cir. 2001) (en banc).

Ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993); *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) ("The ripeness inquiry contains both a constitutional and a prudential component."). While Article III ripeness is jurisdictional, "[p]rudential considerations of ripeness are discretionary. . . ." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc).

[1] Although the Supreme Court has described takings claim ripeness as addressing prudential rather

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[2] The district court found the McClungs' claim ripe for review. *See Tapps Brewing, Inc.*, 482 F. Supp. 2d at 1227-28. On appeal, the City originally argued that the McClungs' takings claim was not ripe, but then at the hearing agreed with the McClungs that the claim was indeed ripe.

than Article III considerations, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997) (describing the ripeness standard of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985), as a "prudential hurdle" to a regulatory takings claim), our Circuit has analyzed takings claim ripeness as raising both prudential and Article III considerations. *Compare Beverly Blvd. LLC v. City of West Hollywood*, 238 Fed. Appx. 210, 212 (9th Cir. 2007) ("We need not resolve whether this claim is ripe under the standards articulated in *Williamson* . . . and . . . assume without deciding that the takings claims are ripe in order to reject them on the merits."); *and Weinberg v. Whatcom County*, 241 F.3d 746, 752 n.4 (9th Cir. 2001) ("We assume without deciding that the Federal takings claim is ripe."); *with West Linn Corporate Bank L.L.C. v. City of West Linn*, 534 F.3d 1091, 1099 (9th Cir. 2008) (describing ripeness as "'determinative of jurisdiction'" (quoting *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 502 (9th Cir. 1990))); *Vacation Village, Inc. v. Clark County*, 497 F.3d 902, 912 (9th Cir. 2007) (same); *and Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 661 (9th Cir. 2003) (affirming district court's determination of lack of subject matter jurisdiction based on a *Williamson* analysis).

[2] We need not determine the exact contours of when takings claim ripeness is merely prudential and not jurisdictional. In this case, we easily conclude that the facts presented raise only prudential concerns. The McClungs installed the storm pipe over ten years ago, resulting in a clearly defined and concrete dispute. *See Thomas*, 220 F.3d at 1139 (stating that Article III ripeness requires the court to analyze whether the

"alleged injury is too 'imaginary' or 'speculative' to support jurisdiction"). Because this case raises only prudential ripeness concerns, we have discretion to assume ripeness is met and proceed with the merits of the McClungs' takings claim. Accordingly, we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal.

B.

At issue are two different upgrades — Ordinance 1603 requiring that all new developments include a minimum of 12-inch storm pipe, and the request that the McClungs install a 24-inch pipe. We analyze these two upgrades separately, and hold that the district court properly found that the *Penn Central* analysis applies to the 6- to 12- inch requirement, and that the McClungs contracted to install a 24-inch pipe.

1.

[3] The Ninth Circuit has yet to address whether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be addressed under the *Penn Central* or *Nollan/Dolan* framework. Other courts addressing this general issue have come to different conclusions. *Compare Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995) (finding that "[g]iven the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the 'essential nexus' and

'rough proportionality' tests are properly limited to the context of development exactions"); *City of Olympia v. Drebick*, 126 P.3d 802, 807-08 (Wash. 2006) (rejecting the view "that local governments must base GMA impact fees on individualized assessments of the direct impacts each new development will have on each improvement planned in a service area"); *San Remo Hotel L.P. v. City & County of S.F.*, 41 P.3d 87, 104-05 (Cal. 2002) (distinguishing between a fee condition applied to a single property that would be subject to *Nollan / Dolan* review, and a generally applicable development fee); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (finding that *Dolan* does not apply to a generally applicable legislative decision); *and McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (concluding that nothing in *Dolan* supports its application to impact fees); *with Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 636 (Tex. 2004) (finding that the *Nollan / Dolan* analysis is not limited to dedications of land); *and Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (applying *Nollan / Dolan* in "evaluating the constitutionality of an impact fee ordinance").

After reviewing the cases establishing these tests and the principles underlying them, we conclude that *Penn Central* applies to Ordinance 1603.[3]

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[3] We observe that the ordinance before us concerns a permit condition designed to mitigate the adverse effects of the new development. New construction increases the burden on the City's sewer system and increases the loss that might result from flooding. After experiencing considerable flooding, the City enacted Ordinance 1603 to require most new developments to include specified storm pipes. We are not confronted, therefore,

A plaintiff seeking to challenge a government action as an uncompensated taking of private property may proceed under one of four theories: by alleging (1) a physical invasion of property, (2) that a regulation completely deprives a plaintiff of all economically beneficial use of property, (3) a general regulatory takings challenge pursuant to *Penn Central*, or (4) a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). At issue here is application of the latter two doctrines.

[4] In *Penn Central*, the New York City Landmarks Preservation Commission refused to approve plans to construct an office building over Grand Central Terminal due to its "landmark" status under the Landmarks Preservation Law. *Penn Central*, 438 U.S. at 116-17. *Penn Central* recognized that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124 (citation omitted); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002) (distinguishing cases involving physical possession of property versus regulations that do not cause a categorical taking). *Penn Central* acknowledged that it was "unable to develop any 'set formula'" for evaluating these types of claims, but identified relevant factors, such as the economic

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with a legislative development condition designed to advance a wholly unrelated interest. We do not address whether *Penn Central* or *Nollan / Dolan* would apply to such legislation.

impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *Penn Central*, 438 U.S. at 124; *see also Lingle*, 544 U.S. at 538-39 (discussing *Penn Central*).

In comparison to *Penn Central*, "[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions — specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. In *Nollan*, the California Coastal Commission conditioned the grant of Nollan's development/rebuilding permit of his beachside home on Nollan's dedication of an easement on the property to the public. *Nollan*, 483 U.S. at 828. In *Dolan*, the Oregon Land Use Board of Appeals conditioned the grant of Dolan's permit to expand a store and parking lot on Dolan's dedication of a portion of the relevant property as a "greenway" and bicycle/pedestrian pathway. *Dolan*, 512 U.S. at 379-80. The Supreme Court recently described the holdings of these cases as follows:

> In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. [*Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831-32]. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government

> was entitled to deny. The Court in *Nollan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. [*Nollan*, 483 U.S. at 834-37.] The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be "'rough[ly] proportiona[l]' . . . both in nature and extent to the impact of the proposed development." [*Dolan*, 512 U.S. at 391.]

Lingle, 544 U.S. at 546-47. In *Nollan*, the Court stuck down the condition as an unconstitutional taking because there was no logical connection (i.e., no "essential nexus") between the adverse impacts of the development and the required easement. *Nollan*, 483 U.S. at 837. In *Dolan*, the Court found the exactions unconstitutional because the City failed to show that the conditions were roughly proportional to the negative impacts caused by the development. *Dolan*, 512 U.S. at 394-95.

The facts of *Nollan* and *Dolan* — involving adjudicative, individual determinations conditioning permit approval on the grant of property rights to the public — distinguish them from the line of cases upholding general land use regulations. *Dolan*, 512 U.S. at 384-85. Unlike the facts of *Dolan*, cases questioning land use regulations "involve[ ] essentially legislative determinations classifying entire areas of the city" and placing limitations on the use owners may make of their property. *Id.* at 385. In comparison to legislative land determinations, the *Nollan / Dolan* framework applies to adjudicative land-use exactions

where the "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. Indeed, the Supreme Court has recognized that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land-use decisions conditioning approval of development on the *dedication of property* to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (emphasis added); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 772 n.11 (9th Cir. 2000), *aff'd* 535 U.S. 302 (2002) (noting that the *Nollan/Dolan* framework applies to "land-use decisions conditioning approval of development on the dedication of property to public use" and is "inapposite to regulatory takings cases outside [this] context").

[5] Applying the general principles underlying the *Nollan/ Dolan* and *Penn Central* cases, we hold that Ordinance 1603's requirement that new developments include at least 12-inch storm pipes is subject to review under the *Penn Central* analysis.

[6] Similar to *Penn Central*, which addressed whether restrictions imposed by law on the plaintiff's development of a landmark building effected a taking, *see Penn Central*, 438 U.S. at 122, at issue here is whether Ordinance 1603 — which applies to all new developments — effected a taking by requiring the McClungs to install a 12-inch pipe. Ordinance 1603 is akin to the "classic example" recognized by *Penn Central* of zoning laws that generally "do not affect existing uses of real property" but rather affect proposed development, and are upheld where the "'health, safety, morals, or general welfare' would be

promoted by prohibiting particular contemplated uses of land." *Id.* at 125 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)). That Ordinance 1603 required the McClungs to take the affirmative step of installing a new pipe, as opposed to prohibiting development generally, does not change the analysis. Indeed, Ordinance 1603 is less intrusive than such zoning laws because the McClungs were able to build their Subway sandwich shop after installation of the legislatively-mandated pipe.

Unlike *Nollan* and *Dolan*, the facts of this case involve neither an individual, adjudicative decision, nor the requirement that the McClungs relinquish rights in their real property. Ordinance 1603 was the source of the 12-inch storm pipe requirement, not an adjudicative determination applicable solely to the McClungs. Further, the City already had an easement for the storm pipe such that the McClungs gave up no rights to their real property. To extend the *Nollan/Dolan* analysis here would subject *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers. As noted by *San Remo Hotel*, 41 P.3d at 105, any concerns of improper legislative development fees are better kept in check by "ordinary restraints of the democratic political process."

The McClungs make several arguments against application of the *Penn Central* standard, none of which is compelling. First, relying on *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the McClungs argue that the requirement that they install a new pipe acted as a monetary exaction and resulted in a per se physical taking of their money, to which

Penn Central does not apply. *Brown* did not address monetary exactions, and in any event, did not apply the *Nollan/Dolan* analysis to the facts presented. Rather, *Brown* addressed the narrow issue of whether a transfer of interest accrued on an IOLTA account to the Legal Foundation of Washington was an uncompensated taking, and found that it should be analyzed under a per se approach as opposed to the *Penn Central* analysis. *Brown*, 538 U.S. at 235.

[7] We further reject the McClungs' characterization of Ordinance 1603 as creating a monetary exaction — it does not require the payment of money in exchange for permit approval. Rather, it provides an across-the-board requirement for all new developments. Even if the upgrade could be viewed as a monetary exaction for the cost of upgrading the storm pipe, however, *Nollan/Dolan* still would not apply. A monetary exaction differs from a land exaction — "[u]nlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *see also San Remo Hotel, L.P. v. S.F. City & County*, 364 F.3d 1088, 109798 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005) (stating that the state court's analysis of the state issues "was thus equivalent to the approach taken in this circuit, which has also rejected the applicability of *Nollan/Dolan* to monetary exactions such as the ones at issue here"); *Garneau v. City of Seattle*, 147 F.3d 802, 808 (9th Cir. 1998) (upholding a city ordinance that required landlords to pay a $1,000 per tenant relocation assistance fee to low income tenants displaced by the change of use or

substantial rehabilitation of a property);[4] *Commercial Builders of N. Cal. v. Sacramento,* 941 F.2d 872, 873-75 (9th Cir. 1991) (rejecting application of *Nollan* to ordinance that conditioned the issuance of nonresidential building permits on the payment of a fee used to assist in financing low-income housing).

Next, the McClungs attempt to recast the facts as involving an individualized, discretionary exaction as opposed to a general requirement imposed through legislation. The McClungs make this argument in recognition of the fact that at least some courts have drawn a distinction between adjudicatory exactions and legislative fees, which have less chance of abuse due to their general application. *See San Remo Hotel,* 41 P.3d at 104 (distinguishing between a fee condition applied to single property that would be subject to *Nollan / Dolan* review and a generally applicable development fee). The facts do not support the McClungs falling within the former category. All new developments must have at least 12-inch storm pipe; there is no evidence on the record that the McClungs were singled out.[5]

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[4] The main opinion of *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), written by Judge Brunetti, found that the *Nollan / Dolan* analysis did not apply to this permit condition. *Id.* at 808. However, in concurring opinions, Judge O'Scannlain stated that *Nollan / Dolan* should apply, *id.* at 814, while District Judge Williams found that the permit condition should be analyzed under the Due Process Clause instead of the Fifth Amendment. *Id.* at 818. In the end, two of the three *Garneau* judges agreed that *Nollan / Dolan* did not apply to the permit requirement.

[5] The McClungs also argue that Ordinance 1603 does not require a developer to replace non-conforming storm pipe, and even if it did, the requirement is invalid under Revised Code of Washington

[8] In sum, we affirm the district court's determination that the *Penn Central* analysis applies to the requirement that the McClungs install a 12-inch storm pipe.[6]

2.

In comparison to the 12-inch requirement, the request that the McClungs install a 24-inch pipe was not based on any general regulation applicable to the McClungs, but rather an individualized request. We need not decide whether this factual difference affects whether the *Nollan / Dolan* or *Penn Central* analysis applies, however, because we hold that the McClungs impliedly contracted to install a 24-inch pipe. *See Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991) ("It is well-established that this court should avoid

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("RCW") 82.02.020, which prohibits the City from imposing fees on developments. The district court previously found that Ordinance 1603 "established twelve inches as the minimum pipe size requirement for any new development in the City of Sumner." *Tapps*, 482 F. Supp. 2d at 1228 n.7. The district court also addressed, and granted summary judgment on, the McClungs' state law claim for violation of RCW 82.02.020. *Id.* at 1233. The McClungs did not appeal the district court's grant of summary judgment on the state law claims and did not raise either of these arguments in their Opening Brief. The McClungs are therefore precluded from making this argument.

[6] Because the McClungs' appeal is premised on the contention that *Nollan / Dolan* review should apply here — and they have not argued that the City was not entitled to summary judgment if *Penn Central* applied — our conclusion that *Penn Central* provides the proper standard resolves the McClungs' challenge to the City's 12-inch pipe requirement.

adjudication of federal constitutional claims when alternative state grounds are available.").

[9] Under Washington law, "[b]efore a court can find the existence of an implied contract in fact, there must be an offer; there must be an acceptance; the acceptance must be in the terms of the offer; it must be communicated to the offeror; there must be a mutual intention to contract; [and] there must be a meeting of the minds of the parties." *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 301 P.2d 759, 762 (Wash. 1956) (internal citation omitted). "[U]nder a unilateral contract, an offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by performance, and the contract then becomes executed." *Multicare Med. Ctr. v. Dep't of Social & Health Servs.*, 790 P.2d 124, 131 (Wash. 1990). The City has the burden to "prove each essential fact [of a contract], including the existence of a mutual intention." *Cahn v. Foster & Marshall, Inc.*, 658 P.2d 42, 43 (Wash. App. 1983); *see also Bogle & Gates, P.L.L.C. v. Zapel*, 90 P.3d 703, 705 (Wash. App. 2004).

[10] In its December 27, 1995 letter, the City offered to waive certain permit fees in exchange for the McClungs' installation of a 24-inch storm pipe:

> As a developer, you are required to install a 12-inch storm drain as a minimum. My estimate shows the cost difference between a 12-inch and a 24-inch diameter pipe ranges from $7,200 to $7,500. To off-set the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm

> drainage systems for both the development and the Subway Shop. . . . *If you find this acceptable, please proceed with the revisions to the Plans.*

(emphasis added). This letter provides the McClungs the choice of either agreeing to install a 12-inch pipe and pay the usual fees, or install a 24-inch pipe and receive the fee waiver. The McClungs accepted the latter option by revising their development plans and installing a 24-inch pipe. Thus, the McClungs impliedly contracted to install the 24-inch pipe.

[11] None of the McClungs' arguments against the existence of a contract has merit. First, the McClungs argue that installing the 24-inch pipe was a mandatory requirement. The plain language of the December 27, 1995 letter clearly shows otherwise. Second, the McClungs claim that they did not understand the letter as an offer. Their subjective intent, however, is irrelevant where their objective actions indicate acceptance of the offer. *See City of Everett v. Sumstad's Estate*, 631 P.2d 366, 367 (Wash. 1981) (stating that Washington follows the "objective manifestation theory of contracts"). Third, the McClungs argue that for there to be an implied contract, it would have to cover the entire upgrade from 6-inch to 24-inch pipe because the 6-inch to 12-inch requirement was illegal and/or contrary to *Nollan/Dolan*. As discussed above, *Nollan/Dolan* does not apply, and the district court rejected their state law claims. Finally, the McClungs argue that the City misrepresented its authority and the McClungs acted under compulsion. There is absolutely no legal or factual support for these arguments, and we reject this claim out of hand. Because the McClungs were not compelled to install a

24-inch pipe, but voluntarily contracted with the City to do so, there was simply no "taking" by the City.

IV.

We hold that the district court properly determined that the *Penn Central* standard applies to the City's requirement that the McClungs install a storm pipe at least 12 inches in diameter, and that the McClungs impliedly contracted to install a 24-inch pipe.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CASE NUMBER: C06-5006RBL

[Filed February 21, 2007]

TAPPS BREWING INC., DANIEL McCLUNG and ANDREA McCLUNG	)
v.	)
CITY OF SUMNER	)

JUDGMENT IN A CIVIL CASE

[✓] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiffs' Motion for Partial Summary Judgment on Federal Takings Issues is DENIED; Defendant's Motion for Summary Judgment on All Remaining Claims is GRANTED and the action is DISMISSED WITH PREJUDICE.

DATED: 2/21/2007

BRUCE RIFKIN

Clerk

/s/ Jean Boring

(By) Deputy Clerk, Jean Boring

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. C06-5006RBL

[Filed February 16, 2007]

TAPPS BREWING INC., a Washington Corporation, and DANIEL McCLUNG and ANDREA McCLUNG, Individually and as a Marital Community,	)
Plaintiffs,	)
v.	)
CITY OF SUMNER,	)
Defendant.	)

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment on Federal Takings Issues (Dkt. 42-1) and Defendant's Motion for Summary Judgment on All Remaining Issues (Dkt. 45-1). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

The history of this case spans more than nine years. This dispute concerns a stormwater pipe upgrade requirement imposed by Defendant City of Sumner ("City") upon Plaintiffs Daniel and Andrea McClung ("Plaintiffs") in exchange for granting their development permit and waiving certain permit fees. Plaintiff Tapps Brewing is no longer a part of the action.

On April 27, 1998, Plaintiffs Tapps Brewing and Daniel and Andrea McClung filed suit in Pierce County Superior Court against the City of Sumner. Dkt. 5-2, at 3. Plaintiffs' complaint alleged that the City's General Facilities Charge ("GFC"), which was imposed on the Plaintiffs as a condition of obtaining a building permit, was illegal under state law. Dkt. 5-2, at 3.

On September 3, 1999, Plaintiffs filed a Motion for Summary Judgment. Dkt. 5-3, at 12. In their motion, they raised federal constitutional issues by citing a federal constitutional takings case. Dkt. 5-3, at 20. The Pierce County Superior Court denied the motion. Dkt. 7-8, at 11.

On November 1, 1999, Plaintiffs sought discretionary review of the court's decision. Dkt 7-9, at 1-2. The Washington Court of Appeals denied the request. Dkt. 7-9, at 6. The Plaintiffs filed a Motion to Modify the Commissioner's Ruling on April 11, 2000 (Dkt. 7-11, at 19), and entered into a stipulation with the City permitting appellate review pursuant to RAP 2.3(b)(3) (Dkt. 7-11, at 25). Plaintiffs and City

stipulated that the only issue before the Washington Court of Appeals was the alleged violations of RCW 82.02.020 (prohibiting cities from imposing fees or exactions that are disproportionate to the impact of the development). Dkt. 7-11, at 25.

On May 12, 2000, the Court of Appeals granted interlocutory review (Dkt. 7-11, at 27) and on May 4, 2001, issued its decision (Dkt. 7-11, at 29).[1] The Court of Appeals affirmed the trial court's denial of Plaintiffs' Motion for Summary Judgment and remanded to the trial court for further proceedings. Dkt. 7-11, at 29.

On March 28, 2002, Plaintiff filed a Motion for Leave to Amend Complaint. Dkt. 8-2, at 1. The Proposed Amended Complaint would have clarified "the relief requested and more explicitly state[d] the constitutional theories underlying plaintiffs' claims." Dkt. 8-2, at 2. The trial court denied the motion on April 12, 2002. Dkt. 8-2, at 18.

On June 12, 2002, trial commenced (Dkt. 8-4, at 17), and on October 30, 2002 the court issued its decision (Dkt. 8-11, at 14). The court concluded that the GFC that the City imposed on Tapps Brewery, Inc., was invalid. Dkt. 8-11, at 11-12. However, the court concluded that the GFC imposed on the Plaintiffs was not invalid and dismissed their claims with prejudice. Dkt. 8-11, at 11-12.

Plaintiffs filed a Notice of Appeal with the Washington State Supreme Court. Dkt. 8-11, at 18.

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[1] *Tapps Brewing, Inc. v. City of Sumner*, 106 Wash. App. 79, 22 P.3d 280 (2001).

The Washington Supreme Court declined review (Dkt. 9-2, at 20) and transferred the case to the Court of Appeals (Dkt. 9-3, at 1). The Court of Appeals issued an unpublished second opinion, *Tapps II*,[2] on January 25, 2005, reversing and remanding for trial on Plaintiffs' challenge to the pipe upgrade obligation's legality. Dkt. 9-3, at 3. The Court of Appeals also directed that Plaintiffs be allowed to amend the complaint to clarify the constitutional claims. Dkt. 9-3, at 20.

After Plaintiffs amended the complaint (9-4, at 5), the City removed the action to this Court on January 6, 2006 (Dkt. 1-1). This Court denied the Plaintiffs' Motion to Remand on March 3, 2006. Dkt. 18.

The facts giving rise to the procedural history are as follows. In the early 1990's, the City of Sumner experienced severe flooding. Dkt. 48-1,at 2. To solve this problem, the City adopted a Stormwater Comprehensive Plan and accompanying stormwater regulations (Dkt. 48-1, at 2), and the City began reconstructing its drainage system (48-1, at 3). To pay for the construction, the City adopted the Stormwater General Facility Charge ("GFC"), which is calculated using the total amount of impervious surface of the property. Dkt. 48-1, at 3.

Plaintiffs Andrea and Daniel McClung own four adjoining lots on the northwestern corner of Valley and Main streets in the City of Sumner. Dkt. 42-3, at 4. At the time of purchase, a gravel alley ran from east to

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[2] *Tapps Brewing Co., Inc. v. McClung*, No.31959-4-II, 2005 WL 151932 (Jan. 25, 2005).

west at the north end of the lots, separating them from Sumner High School. Dkt 42-3, at 4-5. The Plaintiffs asked the City to vacate the alley, and the City agreed to the vacation in March 1994. Dkt. 42-3, at 6, 8. The City retained a utility easement beneath the alley for a stormwater pipe. Dkt. 42-3, at 8-9.

In May of 1994, the Plaintiffs wished to remodel one of the lot houses into a Subway sandwich shop and convert the vacated alley into a paved parking lot. Dkt. 42-3, at 12-13. They submitted plans to the Sumner Community Development Review Committee on May 19, 1994. Dkt. 42-3, at 12. The City informed Plaintiffs that they would have to install a biofiltration swale to filter the runoff from the new paved parking area. 42-3, at 14.

On September 29, 1995, the City sent Plaintiffs a letter retracting that requirement and instead conditioning approval of the building permit on the installation of a new stormwater line. Dkt. 48-3, at 111. The letter stated, "[t]he existing storm drainage system serving this development and the area along Main Street west of this site is inadequate according to the Stormwater Comprehension Plan of 1992. It states that a 24-inch pipeline is required." Dkt. 48-3, at 111. This letter was issued as a result of a meeting between Daniel Rich, the Plaintiffs' engineer, and Bill Shoemaker, the City's engineer. Dkt. 8-6, at 5.

On October 10, 1995, Mr. Rich and Mr. Shoemaker again met to discuss the drainage system. Dkt. 8-6, at 7. Mr. Shoemaker informed Mr. Rich that the City "dug up the existing storm line near the catch basin . . . . [and] found that the line is only 12" for four feet, then changes to 6"." Dkt. 8-6, at 7. Mr. Rich noted

that the "existing 6" line is essentially worthless as far as meeting the expected flow of 15.2 cfs." Dkt. 8-6, at 7. Mr. Shoemaker also indicated that the "City would probably help with the cost." Dkt. 8-6, at 7.

On December 27, 1995, the City sent another letter to Plaintiffs, explaining that the existing stormwater line (at six inches in diameter) was deficient, and the Plaintiffs' property required a twelve inch diameter pipe per the City's stormwater regulations. Dkt. 48-3, at 114. The City stated, "as a developer, you are required to install a 12-inch storm drain as a minimum." Dkt. 48-3, at 114. The City additionally informed the Plaintiffs through this letter that it wanted them to install a twenty-four inch stormwater line instead of the required twelve-inch line. Dkt. 48-3, at 114. The City made this request because the City's Stormwater Comprehensive Plan called for a pipe with enough capacity to handle a 100-year flood. Dkt. 48-3, at 111. The City informed Plaintiffs that to "offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges . . . . [amounting] to about $8,000 to $8,500." Dkt. 48-3, at 114. The City further stated, "[i]f you find this acceptable, please proceed with the revisions to the Plan." Dkt. 48-3, at 114. Plaintiffs, assuming that "the terms set out in [the City's] letter of December 27, 1995, as being the terms that [they were] required to comply with to obtain City approval for [their project]," did not respond to the City's letter but instead proceeded to install a twenty-four inch pipe. Dkt. 51-3, at 2.

The pending motions before this Court are the Plaintiff's Motion for Summary Judgment on Federal Takings Issues (Dkt. 42) and the Defendant's Motion for Summary Judgment on All Remaining Claims. (Dkt. 45). As there are no material issues of fact, this Order addresses all remaining claims: (1) violation of the Takings Provision of the Fifth Amendment of the U.S. Constitution pursuant to 42 U.S.C. § 1983; (2) reasonable attorneys fees pursuant to 42 U.S.C. § 1988; (3) violation of Article 1, Section 16 of the Washington State Constitution; and (4) violation of RCW §§ 35.92.025 and 82.02.020.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is

sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.* , 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. JURISDICTION AND EXHAUSTION OF REMEDIES

The City argues that Plaintiffs' Fifth Amendment takings claim is barred as a matter of law because the Plaintiffs failed to adjudicate readily available state takings procedures and did not exhaust their administrative remedies. The City relies mainly on *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) for the

proposition that Plaintiffs' claim is not ripe until (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the Plaintiff has sought compensation through the procedures the state has provided for doing so. *Id.* at 194. Therefore, the City argues, this Court is deprived of jurisdiction. Dkt. 45-1, at 10.

Plaintiffs respond that *Williamson County* does not apply because *Williamson County* does not require exhaustion of administrative remedies; rather it only requires that "the decision which forms the basis for the owner's compensation claim be final." Dkt. 50-1, at 9. Further, Plaintiffs argue that because their challenge is a facial challenge the *Williamson County* "ripeness" issue does not apply. Dkt. 50-1, at 10. Plaintiffs state, "Exhaustion and ripeness do not apply in a facial illegal exaction because the decision or action which effects the taking is complete and not subject to ongoing regulatory proceedings." Dkt. 50-1, at 10 (citing *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1104 (9th Cir. 2001)).

While "[f]acial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation," Plaintiffs fail to recognize the dual nature of their claim. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003). Plaintiffs' claim of an illegal upgrade installation requirement actually consists of two claims, each implicating separate legal authority: (1) the City's enforcement of Ordinance No. 1603 requiring a pipe upgrade from six to twelve inches, and (2) the City's offer to waive fees in

consideration for installation of a twenty-four inch oversized pipe.

1. City's Enforcement of Ordinance No. 1603 – Pipe Upgrade Requirement from Six to Twelve Inches

Sumner Municipal Ordinance No. 1603 expressly adopts the stormwater regulations contained in the "Surface Water Design Manual" published by the King County Department of Public Works Division of Surface Water Management.[3] Dkt. 53-1, at 13, 73. This manual establishes a twelve inch minimum pipe size requirement for new, permitted developments in the City of Sumner. Dkt. 53-1, at 13; Dkt. 48-3, at 99-100. The City states that "the City simply adopted the pipe size and design criteria," and imposed those criteria, which are "applicable to *any* new development in the City," on the Plaintiffs. Dkt. 52, at 3.

Plaintiffs originally cast their claims as "as-applied" claims. Dkt. 53-2, at 82. Plaintiffs later attempt to re-cast their claims as facial or categorical taking claims.[4] Dkt. 50-1, at 10, 19. A claim is a facial

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[3] The ordinance is codified as Sumner Municipal Code § 13.48.590.

[4] If Plaintiffs' claims had been facial claims, Plaintiffs still would have had a heavy burden proving that a taking occurred. Under a facial challenge to land use regulations, the landowner must demonstrate that the mere enactment of the regulation constitutes a taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987); *Peste v. Mason County*, 133 Wn. App. 456, 471-72 (2006). To prove that a statute on its face effects a taking by regulating the permissible uses of property, the landowner must show that the enactment of the regulation denies the owner of all economically viable use of the

challenge where the Plaintiffs' grievance arises solely from the existence of the statute itself; that is, there is no other basis for its challenge. *Hacienda*, 353 F.3d at 656. A facial challenge "by its nature does not involve a decision applying the statute or regulation." *Id.* at 655 (citing *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). Conversely, an as-applied challenge occurs where the ordinance alone is not the basis for the challenge. *Id.* at 656.

Here, Plaintiffs' claims, despite their attempt to re-cast them, are "as-applied" claims. Plaintiffs' claims, in part, challenge the City's enforcement of Ordinance No. 1603 (requiring that new permitted developments install twelve inch stormwater pipes, if needed) against them.[5] Dkt. 51-1, at 2. Therefore, Plaintiffs' challenge of the six to twelve inch pipe upgrade is an as-applied challenge.

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property. *Keystone*, 480 U.S. at 495; *Peste*, 133 Wn. App. at 472. "A facial challenge in which the court determines a regulation denies all economically viable use of property should prove a rare occurrence." *Guimont v. Clarke*, 121 Wn.2d 586, 606 (1993) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016-18 (1992) (internal quotations omitted).

[5] Plaintiffs state that the motion boils down to the question of whether it is "unconstitutional for a municipality to require a property owner to upgrade a publicly-owned stormwater pipe as a condition to granting a development permit where . . . the upgrade obligation is a unique, administratively determined, discretionary imposition on a single property owner, rather than a generally applicable fee or charge that is legislatively mandated and calculated pursuant to a legislatively prescribed formula." Dkt. 51-1, at 2.

As-applied challenges must meet both prongs of the *Williamson County* ripeness analysis. *Hacienda,* 353 F.3d. at 657. First, Plaintiffs must have obtained a final decision from the entity charged with implementing the regulation. *Id.* at 657. The Plaintiffs need not have resorted beyond the initial decision maker to fulfill the final decision prong. *Id.* Here, the "finality" requirement of *Williamson* does not preclude ripeness because, "[u]nlike *Williamson*, there is no ongoing regulatory proceedings, so there is no occasion, as there was in *Williamson*, to await a final decision." *Wash. Legal Found.*, 236 F.3d at 1104. Further, the ordinance has already been applied to the Plaintiffs, as the December 27, 1995 letter makes clear. Dkt. 48-3, at 114. Plaintiffs have met the first prong of the *Williamson County* test.

Second, under *Williamson County*, the Plaintiffs must have sought and been denied compensation for a deprivation before a taking is complete. *Hacienda*, 353 F.3d at 657. The City argues that Plaintiffs could have requested and received multiple administrative remedies, and their failure to do so deprives them of the opportunity to seek relief from this Court. Dkt. 45-1, at 10. The Plaintiffs argue that it "would be fundamentally unfair" to permit the government to remove this action to federal court and then hold that the Plaintiffs' claim is unripe because the Plaintiffs did not litigate in state court. Dkt. 50-1, at 15. This Court agrees. The City fails to show in the record any statute or code requiring[6] Plaintiffs to exhaust their

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[6] The City directs the Court's attention to several administrative remedies made available to the Plaintiffs through the Sumner Municipal Code. Dkt. 49-1, at 9-12. However, these are remedies

administrative remedies before filing their Fifth Amendment claims in Pierce County Superior Court. Since Plaintiffs have pursued an inverse condemnation action in Washington state court (Dkt. 5-2, at 3), their takings claim regarding the six to twelve inch upgrade is ripe for adjudication in this Court.

2. City's Offer to Waive Fees in Consideration for Installation of a Twenty-Four Inch Pipe

The City's separate authority for upgrading the pipe from twelve to twenty-four inches is found in the City's "Stormwater Comprehensive Plan," adopted pursuant to Ordinance No. 1625. Dkt. 48-1, at 70; Dkt. 48-2, at 96; Dkt. 48-2, at 130. The Stormwater Comprehensive Plan required the City to eventually install a twenty-four inch pipe at Lewis Avenue and Main Street to serve the greater area surrounding Plaintiffs' property. Dkt. 48-2, at 96; Dkt. 48-2, at 130. Pursuant to Sumner Municipal Code § 13.48.610, when it is "deemed necessary by the city, as a condition of development for the developer" to install a pipe that is "larger than required," that developer shall "be eligible for a payback agreement" and the "storm drainage utility may participate in the cost to construct said oversizing upon council approval." Dkt. 53-1, at 13.

Again, the parties make the same *Williamson County* ripeness arguments to the City's offer to waive fees in consideration for installation of a twenty-four

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the Plaintiffs "could have requested and received," not remedies they were required to exhaust before pursuing this action in state court. Dkt. 49-1 at 9.

inch pipe. Dkt. 45-1, at 8-11; Dkt. 50-1, at 9-10. The parties' attempts to apply *Williamson County* creates an unusual dilemma as the challenged ordinance, requiring the installation of a twenty-four inch pipe, applies only to the City, not to the Plaintiffs as the developers. Logically, the Plaintiffs cannot have obtained a "final decision" of the application of the ordinance as required by *Williamson County* because the ordinance was never applied to the Plaintiffs. Since the *Williamson County* ripeness test does not apply here, the Plaintiffs' takings claim regarding the twelve to twenty-four inch upgrade is ripe for adjudication. This opinion will now examine Plaintiffs' claims.

C. FIFTH AMENDMENT TO U.S. CONSTITUTION CLAIM PURSUANT TO 42 U.S.C. § 1983

The final Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment applies to the States as well as the Federal Government. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

"The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-23(2002)). The Constitution requires payment of compensation whenever the government acquires private property for public purpose, but the Constitution "contains no comparable reference to regulations that prohibit a

property owner from making certain uses of her private property." *Id.* "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194.

The two central questions to be answered in this action are as follows: (1) was there a taking, and (2) if so, was the Plaintiff justly compensated? *See, e.g., Penn Cent. Co. v. City of New York*, 438 U.S. 104 (1978). As noted above, two distinct pipe upgrade obligations are at issue, each requiring a separate analysis.

1. Six to Twelve Inch Upgrade

Plaintiffs argue that this upgrade regulation[7] amounted to an uncompensated taking because while "government may regulate real estate development, it may not use regulation as a pretext to force individual

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[7] Despite the allegations of the Plaintiffs (Dkt. 50-1, at 6), the City possessed the requisite statutory authority to require Plaintiffs to upgrade their pipe from twelve inches to twenty-four inches. Sumner City ordinance No. 1603 authorizes the adoption of the "King County Surface Water Design Manual." Dkt. 53-1, at 13, 73. This manual established twelve inches as the minimum pipe size requirement for any new development in the City of Sumner. Dkt. 52, at 2; . Dkt. 53-1, at 13; Dkt. 48-3, at 99-100. Plaintiffs' development was new development, as they proposed to tear down the existing structure and replace that structure with a commercial building. Dkt. 42-3, at 14. The City's engineer informed Plaintiffs that "as a developer" they were required to install a twelve inch storm pipe as a minimum. Dkt. 48-3, at 114. Although the City failed to mention in its letter the pertinent regulation (Dkt. 48-3, at 114), this fact alone does not strip the City of its authority to impose development regulations

owners to pay for general public improvements when the need for improvements is not caused by those individuals who are forced to pay." Dkt. 42-1, at 11. Therefore, Plaintiffs argue, the City may impose development exactions only when they are reasonably related, both in nature and extent, to the negative impacts of their proposed development pursuant to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Nollan* and *Dolan*, the Supreme Court established a two-part test for judging when a development exaction goes beyond the legitimate exercise of the government's police powers and becomes an unconstitutional taking. In *Nollan*, property owners appealed a decision of the California Court of Appeals ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 483 U.S. at 827. The Supreme Court struck down the exaction as an unconstitutional taking and held that an "essential nexus" must exist between the "legitimate state interest" and the permit condition exacted by the city. *Id.* at 837.

Dolan refined the *Nollan* "essential nexus" test by adding a "rough proportionality" standard. *Dolan* concerned the validity of two land exactions where the City of Tigard required the land owner, Mrs. Dolan, to set aside a portion of her land as a publically accessible greenway and a pedestrian path in exchange for issuing a permit allowing her to enlarge her hardware store and parking lot. 512 U.S. at 379-82. The Supreme Court held that the City of Tigard's

exactions were not constitutional because the City's demands were not roughly proportional to the negative impacts created by the expansion of Mrs. Dolan's store and parking lot. *Id.* at 394.

Plaintiffs argue that the stormwater upgrade lacks the essential nexus and rough proportionality required by *Nollan / Dolan*. Dkt. 42-1, at 14. The City responds by arguing that the *Nollan / Dolan* test applies only to land dedications and does not apply to purely monetary actions like the one at issue here. Dkt. 45-1, at 12.

The Supreme Court has held that where the government regulation "neither physically invades" the property nor denies the owners "all economically viable use of their property" the *Nollan / Dolan* analysis framework does not necessarily apply. *Garneau v. City of Seattle*, 147 F.3d 802,807-08 (1998). Before reaching the question of the proper test, the "first inquiry . . .asks only whether government imposition of the exaction would be a taking." *Id.* at 809. The Court analyzed the distinction in *Garneau*:

> The Court had no trouble in either [*Nollan* or *Dolan*] finding that government imposition of the exaction would amount to a taking. In both cases the government demanded permanent physical occupation of some portion of the applicant's land. Courts have generally found that where government action leads to the physical invasion of private property, it constitutes a per se taking. Similarly, if the government action denies the owner of all economically viable use of his property, it is also a per se taking. By contrast, in non-categorical

> takings cases, courts must undertake complex factual assessments of the purposes and economic effects of government actions. Because of the difference in the Court's approach, much turns on the classification of the government's action.

Id. (internal citations omitted). Therefore, the Plaintiffs must show that the City's imposition of the pipe upgrade constituted a taking. *Id.* at 812.

Here, the six to twelve inch pipe upgrade regulation was not a physical invasion of private property, nor did it deny the owner of all economically viable use of the property. In non-categorical regulatory takings cases, such as the one before the Court, the proper inquiry is "an ad hoc, factual inquiry to determine whether the government regulation goes too far." *Id.* at 807. The most important factors are the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations. *Id.* In addition, "the character of the governmental action . . . may be relevant in discerning whether a taking has occurred." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (citing *Penn Transp. Co. v. New York City*, 438 U.S. 104 (1978)) (internal citations omitted).

Here, the Plaintiffs' fail to show that the economic impact is large; at most, the Plaintiffs' costs equal $42,372.02 ($50,872.02, the sum of the engineering services, storm drain construction, soil import and export, and sales tax; minus $8,500, the stipulated amount of the fee waiver). Dkt. 53-1, at 67-70; Dkt. 7-11, at 25. Plaintiffs' overall project entailed demolishing an existing structure and replacing it with

a Subway shop valued at $100,000. Dkt. 48-3, at 104. Plaintiffs have failed to provide reliable evidence in the record, after more than eight years of litigation, of how much a twelve inch pipe upgrade would have cost. The record contains only the Plaintiffs' bill for the six to twenty-four inch pipe upgrade (Dkts. 53-1, at 67, 70) and a City engineer's estimate of the twelve to twenty-four inch pipe upgrade cost (Dkt. 48-1, at 5). Moreover, Plaintiffs have failed to show that the regulation that developers upgrade stormwater pipes to twelve inches (where needed) interfered with "distinct investment-backed expectations." The Plaintiffs' shop has been fully permitted and operation since January of 1997. Dkt. 48-1, at 5.

The character of the government action also indicates that no "takings" occurred. There is no evidence in the record that the City misapplied its regulation requiring a twelve inch pipe, and Plaintiffs fail to produce any evidence showing that the City has not required any other land owner to upgrade the pipe system before granting a permit.

Plaintiffs have shown no diminished rights in the uses of their land and Plaintiffs' have not shown that the commercial use of the parcel has been economically impacted by the requirement to install the twelve inch pipe. Dkt. 48-1, at 5; *see Penn Cent. Transp.*, 483 U.S. at 104 (holding that the law did not affect a taking where the law did not interfere with the owners' present use of the property or prevent them from realizing a reasonable rate of return on their investment).

"[A] party challenging governmental action as an unconstitutional taking bears a substantial burden."

Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998). Plaintiffs fail to meet that burden. Therefore, summary judgment in favor of the City as to the six to twelve inch pipe upgrade should be granted, and summary judgment for the Plaintiff should be denied.[8]

2. Twelve to Twenty-Four Inch Upgrade

The twelve to twenty-four inch upgrade has been mis-characterized by both sides. Plaintiffs' attempt to characterize the twelve to twenty-four inch pipe upgrade as a mandatory condition necessary to obtain a building permit is erroneous. The City's letter clearly indicates the fact that the obligation is not the Plaintiffs', but the City's, and the Stormwater Comprehensive Plan adopted by the City establishes that a twenty-four inch pipe was needed at Lewis Avenue and Main Street to serve the greater area around the Plaintiffs' property. Dkt. 48-2, at 96; Dkt. 48-2, at 130. The City, pursuant to Sumner Municipal Code § 13.48.610, offered to pay for the difference in cost between installation of the twelve inch pipe and twenty-four inch pipe by waiving certain fees and charges. Dkt. 53-1, at 13, 66. The City's letter indicates that if the offer was acceptable, the Plaintiffs should proceed with their plan. Dkt. 53-1, at 66. Plaintiffs did not respond to the City's letter, but instead installed the twenty-four inch pipe. Dkt. 51-3, at 2. The City, accordingly, did not impose the fees upon the Plaintiffs. Dkt. 7-11, at 25. Therefore, it

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[8] Plaintiffs also argue that the stormwater exaction imposed on them was not a tax. Dkt. 42-1, at 21. This argument is not relevant to this action.

appears based on the record that the City made an offer, which the Plaintiffs accepted by performance.

Because Plaintiffs have failed to support their burden showing that the City's actions constituted a taking, summary judgment should be granted in favor of the City. Plaintiffs' motion for summary judgment as to this claim should be denied and Defendant's motion for summary judgment as to this claim should be granted. Further, because Plaintiffs have failed to show that the City of Sumner violated their federally protected rights, Plaintiffs' motion for an award of attorney fees under 42 U.S.C. § 1988 should be denied.

D. ARTICLE I, § 16 WASHINGTON STATE CONSTITUTION CLAIM

The Washington State Constitution, like the Fifth Amendment, prohibits the government from taking property from a private owner without paying just compensation, and in some cases provides greater protection than the Fifth Amendment. *Eggleston v. Pierce County*, 148 Wash. 2d 760, 766 (2003). The Washington State Constitution provides in pertinent part the following:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made.

Wash. Const. art. I, § 16. The Washington Supreme Court has established a two-part test applicable to all

claims of regulatory takings of property under Article 1, section 16. The "inquiry asks first whether the challenged regulation protects the public interest in health, safety, the environment or fiscal integrity." *Robinson v. City of Seattle*, 119 Wash. 2d 34, 49 (1992). The second inquiry is "whether the regulation destroys or derogates any fundamental attribute of ownership: the rights to posses exclusively, to exclude others, and to dispose of property." *Id.* at 50. If either inquiry is satisfied, then that regulation is susceptible to a constitutional taking challenge. *Id.* If not, then the regulation is subjected to a *Penn Central* type analysis, where the Court considers the economic impact of the property, the regulation's interference with investment-backed expectations, and the character of the government's action. *Id.* at 51 (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 335-36 (1990)).

The City argues that the Plaintiffs' state law takings claim fails because no Washington Court has held a utility upgrade obligation to be an unconstitutional taking and because Plaintiffs' claims fail to meet the threshold test set out in *Robinson*. Dkt. 45-1, at 16-17. Plaintiffs respond that the non-existence of such a case does not mean the Plaintiffs have no claim; regardless, "a development exaction becomes a taking if it exceeds what is reasonably necessary to mitigate the direct negative impacts of the development." Dkt. 50-1, at 17 (citing *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721 (2000)).

Here, Plaintiffs have failed to show that the regulation does not protect the public interest or that the regulation destroys any fundamental attribute of ownership. The record shows that the City of Sumner

had experienced severe flooding in the early 1990's, prompting the local government to pass numerous stormwater drainage ordinances. Dkt. 47-1, at 121-40. Also, the pipe upgrade did not destroy a fundamental aspect of Plaintiffs' property ownership; Plaintiffs still enjoy the full use of their land. Last, even if the threshold was met, the same *Penn Central* analysis as applied to the Fifth Amendment claims apply here.[9]

Therefore, the pipe upgrade regulation imposed by the City of Sumner requiring Plaintiffs to install a twelve inch pipe does not effect a taking under the Washington Constitution. In addition, the twelve to twenty-four inch pipe upgrade was an exchange made for consideration, as discussed above, and also does not amount to a taking under the Washington Constitution. To this extent, summary judgment for the Plaintiffs should be denied, and summary judgment for the City should be granted.

E REVISED CODE OF WASHINGTON § 82.02.020

RCW § 82.02.020 prohibits, with certain exceptions, the imposition of "any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of

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[9] *See also, Buttnick v. City of Seattle*, 105 Wn.2d 857 (1986) (holding that the city's requirement that a landowner in a historic preservation district replace a parapet on her building did not amount to an unconstitutional taking given the cost of the replacement and the market value and income producing potential of the building); *Ackerly Commc'ns v. City of Seattle*, 92 Wn.2d 905,919-20 (1979) (holding that an ordinance requiring the removal of signboards along the highways without compensation was not an unconstitutional taking).

residential buildings [or] commercial buildings." The statutory exceptions, found in RCW §§ 82.02.050-.090, do not apply in this case.

The City claims that Plaintiffs are statutorily prevented from raising a claim under RCW § 82.02.020 because Plaintiffs failed to appeal the decision under the Land Use Petition Act ("LUPA"). RCW 36.70C.005-.900. "In order to have standing to bring a land use petition under LUPA, the petitioner must have exhausted his or her administrative remedies . . . . [and] filed for judicial review . . . within 21 days of the issuance of the land use decision." *James v. County of Kitsap*, 154 Wash. 2d 574, 583 (2005) (citing RCW 36.70C.040(3), .060(2)(d)).

Plaintiffs respond that their case fits within one of the exceptions to LUPA. Dkt. 50-1, at 23. RCW 36.70C.030(1)(c) expressly exempts claims for "monetary damages or compensation" from the procedures, standards, and deadlines set forth in LUPA. Therefore, Plaintiffs argue, their claim is subject to a three year statute of limitations, which they satisfy. Dkt. 50-1, at 23.

The Washington Supreme Court recently addressed this issue, holding that the imposition of impact fees as a condition on the issuance of a building permit is a "land use decision" under LUPA and is not reviewable unless a party timely challenges that decision within twenty-one days of its issuance. *James*, 154 Wn.2d at 586-87. The dissent argued that a challenge to the government's decision to issue or withhold a permit is distinct from a challenge to the imposition of illegal fees or taxes. *Id.* at 591-94. However, the majority expressly found that the government's decision to

exact a fee as a condition for granting the developer's building permit constituted a land use decision and not a revenue decision. *Id.* at 583-84.

Accordingly, Plaintiffs claim of a violation of RCW § 82.02.020 is barred under LUPA. To the extent Plaintiffs move for summary judgment on their RCW § 82.02.020 claim, summary judgment should be denied. To the extent the City move for summary judgment on this claim, summary judgment should be granted.

F. REVISED CODE OF WASHINGTON § 35.92.025

RCW § 35.92.025 authorizes cities and towns to charge property owners seeking to connect to the water or sewerage system a reasonable connection fee as a condition to granting the right to connect, so long as the fee represented the property owner's equable share of the cost of the system.

This statute does not apply to this action. The Plaintiffs were already connected to the drainage system. Dkt. 53-1, at 71. The pipe upgrade does not appear to be a "connection" fee thin the meaning of the statute. Moreover, Plaintiffs fail to brief this Court on the issue and do not provide any support for their claim that the City violated this statute. See Dkt. 50-1; Dkt. 51-1.

To the extent Plaintiffs moves for summary judgment on this claim, summary judgment should be denied. To the extent the City moves for summary judgment on this claim, summary judgment should be granted.

III. ORDER

Therefore, it is hereby **ORDERED** that

(1) Plaintiffs' Motion for Partial Summary Judgment on Federal Takings Issues (Dkt. 42-1) is **DENIED**;

(2) Defendant's Motion for Summary Judgment on All Remaining Claims (Dkt. 45-1) is **GRANTED** and the action is **DISMISSED WITH PREJUDICE**; and

(3) The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 16th day of February, 2007.

/s/
RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

APPENDIX D

PLAINTIFFS' EX. ____
NO. 98-2-06522-8

Exhibit 1

ORDINANCE NO. 1620

CITY OF SUMNER, WASHINGTON

AN ORDINANCE vacating a portion of the easterly extension of the W.E. Daniel County Road.

WHEREAS, Daniel W. McClung and Andrea M. McClung, husband and wife, and Sumner School District No. 320 filed a petition with the City Clerk to vacate the hereinafter described portion of the easterly extension of W.E. Daniel County Road, as more particularly set forth herein; and

WHEREAS, on January 3, 1994, the City Council adopted Resolution No. 808, declaring its intent to vacate the hereinafter described portion of the easterly extension of the W.E. Daniel County Road and affixed Monday, February 7, 1994, at the hour of 7: 30 p.m., at the City Hall, 1104 Maple Street, Sumner, Washington, as the time and place when and where said resolution to vacate would be heard and determined; and

WHEREAS, pursuant to RCW 35.79.020, notices of the time and place of the hearing were properly given; and

WHEREAS, at the time and place fixed, the resolution was duly heard; and

WHEREAS, all steps and proceedings required by law and by resolution of the City Council to vacate the hereinafter described portion of the easterly extension of the W.E. Daniel County Road, having been duly taken and carried out; now, therefore,

THE CITY COUNCIL OF
THE CITY OF SUMNER, WASHINGTON

DO ORDAIN AS FOLLOWS

Section 1. That the following portion of the easterly extension of the W.E. Daniel County Road, situated in the City of Sumner, County of Pierce, State of Washington, described in Exhibit "A", which is attached hereto and made a part hereof, is hereby vacated, subject to the conditions set forth in Section 2; provided, that the City hereby retains an easement for public utilities and services under, through and across the above-described real property, together with the right of ingress and egress thereto for the construction, repair and maintenance of said utilities and services, and further retains and reserves an easement for ingress and egress for emergency police and fire vehicles over and across the above-described real property.

Section 2. The above-described property is vacated subject to the following conditions:

1. The recording of a lot line adjustment to consolidate into a single parcel the four (4) parcels owned by Daniel W. McClung and Andrea M. McClung.

2. The abandonment of all driveways onto Main Street from the property of Daniel W. McClung and Andrea M. McClung and the restoration of curbs and sidewalks.

3. The provision that all garbage service to the property of Daniel W. McClung and Andrea M. McClung be from the back side of said property and not from Main Street or Valley Avenue. Enclosures for garbage shall be located off the vacated street and access shall be designed to accommodate garbage vehicles.

4. All access points to the property so vacated be improved to City driveway approach standards.

5. The dedication by Daniel W. McClung and Andrea M. McClung to the City of Sumner of twelve feet (12') as additional right-of-way on Main Street; provided, however, that Daniel W. McClung and Andrea M. McClung shall be allowed to occupy the buildings presently located within said twelve feet (12') until such time as the City utilizes said twelve feet (12') for the improvement of Main Street.

Section 3. The land so vacated, is hereby surrendered and attached to the property abutting thereto as a part thereof, and all right or title of the City and of the public, in and to that portion of said road so vacated, shall and does hereby vest in the

owners of said abutting property as provided by RCW 35.79.040.

Section 4. This ordinance shall be null and void unless all of the conditions set forth in Section 2 are completed within six (6) months from the date of this ordinance.

Passed by the City Council and approved by the Mayor of the City of Sumner, Washington, at a regular meeting thereof this 21st day of March, 1994.

/s/ _____
Mayor

Attest:

/s/ Barbara J. Hughes
City Clerk

Approved as to form:

/s/ _____
City Attorney

[On page 52a of this appendix shading has been added to show emphasis]

APPENDIX E

PLAINTIFFS' EX. _____
NO. 98-2-06522-8

PLAINTIFF'S EXHIBIT NO. 2

City of Sumner
1104 Maple Street
Sumner, Washington 96390

(206) 863-8300

December 27, 1995

Dan Mc Clung
P.O. Box 307
1911 Main Street
Sumner, WA 98390

RE: Main Street Plaza and Subway Shop Development

Dear Mr. McClung:

To correct existing deficiencies, meet the needs of your development and satisfy the future requirements as outlined in the Storm Water Comprehensive Plan, a 24 inch diameter storm drain is to be installed as a condition of development. It will discharge into the 36-inch CMP storm drain on the east side of Valley Avenue. Ultimately, this storm drain will be extended to the high point on Main Street just east of Wood

Avenue at the west boundary of the School property. For the present, a 21-inch diameter stub shall terminate at the west line of Parcel "F". A red-line set of your Plans showing the layout was previously submitted to you.

As a developer, you are required to install a 12-inch storm drain as a minimum. My estimate shows the cost difference between a 12-inch and 24-inch diameter pipe ranges from $7,200 to $7,500. To offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm drainage systems for both the development and the Subway Shop. These charges amount to about $8,000 to $8,500 depending on the exact GFC for the Subway Shop and time spent on inspection. For this consideration, you will have your Engineers prepare the drawings and your contractor construct the storm drain. If you find this acceptable, please proceed with the revisions to the Plans.

Respectfully yours,

/s/ William J. Shoemaker

William J. Shoemaker, P.E.

cc: Mike Wilson, City Administrator
Les MacDonald, PW Director

[On page 55a of this appendix shading has been added to show emphasis]

APPENDIX F

PLAINTIFFS' EX. ____
NO. 98-2-06522-8

PLAINTIFF'S EXHIBIT 3

MEMORANDUM

TO: Les MacDonald - Mike Wilson

FM: Bill Shoemaker /s/

SUBJECT: Construction of 24-inch storm drain in accordance with Comprehensive Plan as condition of development of McClung's Main Street Plaza

DATE: December 7, 1995

The existing storm drainage pipe through this development at the intersection of Valley Avenue and Main street is only a 6-inch. Plugging of this line has caused water to pond in the School's parking lot to the north twice this Fall. This backup has resulted in the filing of one damage claim. Replacement of this pipe is needed whether McClung develops or not. The additional contribution of storm water due to the development is small. The development creates only an additional 3,800 sq. ft. of impervious area.

The Storm Water Comprehensive Plan calls for an upgrade to a 24-inch main (required capacity is 15.2

cfs) to serve this drainage basin to the west and south including about half of the High School complex. McClung is asking the City to participate in the cost of this storm drain. The cost of constructing the required 350 feet of 24-inch main across his property is estimated to range between $24,000 and $28,000. Attached is a draft of a letter and offer that I believe he will accept. In my opinion, this would be an equitable arrangement for both parties.

Please let me know if you agree with my assessment and would recommend such action to the Council.

APPENDIX G

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

No. 98-2-06522-8

[Filed June 17, 2002]

TAPPS BREWING, INC., a Washington corporation, and DANIEL McCLUNG and ANDREA McCLUNG, individually and as a marital community,	)
Plaintiffs,	)
vs.	)
CITY OF SUMNER,	)
Defendant.	)

VERBATIM RECORD OF PROCEEDINGS
June 13, 2002
Tacoma, Washington

* * *

[p.13] * * *

Q [Mr. Severson] Now, do you have an understanding of who owns that storm water pipe in the easement?

A [Mr. Shoemaker] Yes

Q [Mr. Severson] Who could that be?

[p.14] **A** [Mr. Shoemaker] The city.

* * *